Supreme Court, U.S.
FILED
JUN 3 1994
OFFICE OF THE CLERK

No. 93-1770

In The

Supreme Court of the United States

October Term, 1993

SALVATORE A. CIMORELLI,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN A. KAUFMAN
Counsel of Record
ROPES & GRAY
Attorneys for Respondent
One International Place
Boston, Massachusetts 02110
(617) 951-7000

5287
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

LIST OF ALL PARTIES

Petitioner and respondent are identified in the caption. Respondent General Electric Company has no parent company. The following subsidiaries of General Electric Company have issued securities to the public:

GECC Financial Corporation

General Electric Capital Corporation (formerly General Electric Credit Corporation)

General Electric Capital Canada, Inc.

General Electric Credit International, N.V.

General Electric Financial Services, Inc.

Montgomery Ward Credit Corporation

Montgomery Ward & Co., Incorporated

CAMCO, Inc. (Canada)

No. 93-1770

In the

Supreme Court of the United States

October Term, 1993

SALVATORE A. CIMORELLI,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS POSED BY THE PETITION ARE NOT PRESENTED BY THE CASE.

The petition poses two questions, neither of which is presented by the case. The first posed is whether the First Circuit was correct in requiring the production of direct evidence in opposition to summary judgment. Petition at i. In fact, neither the

First Circuit nor the district court imposed any such requirement. Neither of the courts below discussed, let alone relied upon, a distinction between direct and circumstantial evidence. Indeed, the First Circuit affirmed summary judgment for the stated reason that Cimorelli had produced "no evidence whatever" of an essential element of his claim. Petitioner's Appendix ("Pet. App.") at A-4, *Cimorelli v. General Elec. Co.*, No. 93-1549, slip op. (1st Cir. Feb. 4, 1994) (per curiam).

The second question posed in the petition is whether the First Circuit was correct in requiring Cimorelli to discredit GE's explanations of changes to labor vouchers. Petition at i. Again, the First Circuit imposed no such requirement. Indeed, the First Circuit stated that if summary judgment depended on a choice between GE's explanations and Cimorelli's, there "might well be an issue for the jury." Pet. App. at A-4. The dispositive factor was simply that Cimorelli failed to produce any evidence to support his explanation. *Id.*

II.

THE FIRST CIRCUIT ENUNCIATED NO RULE OF LAW THAT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT.

The First Circuit did not enunciate a new legal rule, but merely applied settled law to the particular facts of this case. The rule articulated by this Court provides that when opposing summary judgment, the party with the burden of proof must set forth evidence sufficient to avoid a directed verdict at trial. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248-52 (1986). Applying this same rule, the First Circuit asked "whether Cimorelli pointed the district court to sufficient evidence to permit a reasonable jury to find that a false or fraudulent claim was presented to the federal government." Pet. App. at A-3. Since a false claim is an essential element of a violation of the False Claims Act, *United States v.*

McNinch, 356 U.S. 595, 598-99 (1958), Cimorelli's failure to provide any evidence of this element merited summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986).

Cimorelli's assertion that the First Circuit was "required" to infer from altered documents that a false claim had been made, Petition at 11, is contrary to law. In response to this argument, the First Circuit properly stated that while "[i]nferences are normally drawn in favor of the party opposing summary judgment . . . more than mere suspicion or speculation is required to justify a trial." Pet. App. at A-3 (citing *Liberty Lobby*, 477 U.S. at 249-50); *see also, Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986).

United States v. Hangar One, 563 F.2d 1155 (1977), is not to the contrary. In that case, the government's evidence included the receipt of defective artillery shells and affiants who testified to their personal involvement in acts of fraud. *Id.* at 1157-58. Here, however, Cimorelli is unable to point to any proof whatever that the government received a "defective" claim. Besides, the linguistic formulation of the summary judgment standard in *Hangar One* predates this Court's formulation of the standard in *Matsushita, Celotex,* and *Liberty Lobby.* No longer can mere "matters of speculation," *Hangar One*, 563 F.2d at 1158, defeat summary judgment. *See Matsushita,* 475 U.S. at 586 (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

The petition presents no controversy concerning any matter of law. Instead, it focuses on the First Circuit's application of law; specifically, the court's refusal to infer what Cimorelli claims. As such, the petition does not pose an issue meriting this Court's review. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

STEVEN A. KAUFMAN
Counsel of Record
ROPES & GRAY
Attorneys for Respondent
One International Place
Boston, MA 02110
(617) 951-7000